

IN THE MATTER OF GRIEVANCE ARBITRATION BETWEEN

CITY OF RED WING)	BMS CASE NO. 16-PA-0189
)	
)	
“EMPLOYER”)	
)	DECISION AND AWARD
And)	
)	
GREATER MINNESOTA AFSCME COUNCIL)	RICHARD R. ANDERSON
65— LOCAL UNION 737)	ARBITRATOR
)	
)	
“UNION”)	FEBRUARY 13, 2016
)	

JURISDICTION

The hearing in the above matter was conducted before Arbitrator Richard R. Anderson in Red Wing, Minnesota on January 6, 2016. Both parties were afforded a full and fair opportunity to present their case. Witness testimony was sworn and subject to cross-examination. Exhibits were introduced into evidence by both parties and received into the record. The hearing closed on January 6, 2016. Post-hearing briefs were timely received by email on February 2, 2016, at which time the matter was taken under advisement.

This matter is submitted to the undersigned Arbitrator pursuant to the terms of the parties’ January 1, 2015 through December 31, 2016 collective bargaining agreement, hereinafter the Agreement, which was in effect at the time the issue in the grievance arose. (*Joint Exhibit 10*) The relevant language in Article VIII [*GRIEVANCE PROCEDURE*] provides for arbitration to resolve all outstanding grievance issues. The parties stipulated that this matter does not involve contract arbitrability or any other substantive or procedural issues that would prevent this matter from being considered and is properly before the undersigned Arbitrator for final and binding resolution.

APPEARANCES

For the City

Amy E. Mace – Attorney
Stacey Hawkins – Interim Employee Services Director
Kay Kuhlmann – City Council Administrator
Rick Moskwa – Public Works Director

For the Union

John Spiegelhoff – Greater Minnesota AFSCME Council 65 Staff Representative
Jeremy Freeland – Utility Locator and Grievant
Jim Dahling – Greater Minnesota AFSCME Council 65 Staff Representative
Paul Drotos – AFSCME Local 737 Presidents
Gordy Boldt – Utility Operator

THE ISSUE

The parties could not agree on the precise wording of the issue. The City's proposal was, *"Whether the City violated Section 15.3 of the parties' collective bargaining agreement by not allowing the Grievant to use sick leave for his live-in girlfriend's medical appointment?"*

The Union's proposal was, *"Whether the Employer violated the collective bargaining agreement when it denied the Grievant paid sick leave on June 5, 2015 for a medical appointment for a bona fide permanent member of the employee's household; and if so, what is an appropriate remedy?"*

BACKGROUND

The City of Red Wing, hereinafter the City or Employer, is a municipality with a population of approximately 16,500 located in Goodhue County within south central Minnesota. Greater Minnesota AFSCME Council 65—Local Union 737, hereinafter the Union, is the recognized collective bargaining representative for all of the City's 17 Public Utility employees. The parties have a history of collective bargaining in this unit dating back to 2002. Prior to this, the unit was represented by Utility Employees Local 1, Council 2 from 1999 to 2001 and by International Union of Operating Engineers, Local No. 70 for a period prior to 1999.¹

¹ Exact beginning representation date is unknown.

The Union also represents Public Works and Clerical units.² Jim Dahling is the current Business Representative for all three units. Rick Moskwa is the City's Public Works Director who supervises the Public Utilities operation. He reports to City Council Administrator Kay Kuhlmann who has 18 years in that position and is responsible for implementing all City projects and policies. She reports directly to the City Council. Stacie Hawkins, who was initially hired in 2006, has been the Interim Employee Services Director since March 2015. She is the highest ranking human services employee who is responsible for all areas of human services including contract administration. Prior to this she had been a Human Services Generalist where she was also involved in all areas of human services.

On June 1, 2015 the Grievant submitted a request to use eight hours of paid sick leave for June 11, 2015 citing "*sickness-self*" for the purpose of "*Sarah's Dr. Appt*". (*Joint Exhibit 1 p.1*) The City, that same day, denied the Grievant's leave request on the basis that the "*sick leave was not requested for the employee but for a non-spouse*", adding that "*the CBA/Personnel Policy/State law do not allow sick time for non-immediate family.*" (*Id*)

On June 4, 2015 the Grievant submitted an amended request to use eight hours of paid sick leave citing "*sickness-family*" stating that the purpose of a "*Doctor Appointment for Sarah Wilson significant other - bona fide member of my house hold*". (*Joint Exhibit 1 p.2*) The City, that same day, also denied the Grievant's leave request on the basis that "*Neither the collective bargaining agreement nor State law allows the employee to use sick leave time to care for a girlfriend.*" (*Id*)

On June 8, 2015 the Union filed a Step 1 grievance on the Grievant's behalf, alleging the City violated "*Article XV, Sick Leave, Section 15.3, Subsection D and the Labor Agreement between the City of Red Wing and AFSCME Local 737 (Utilities Unit)*" when it failed to "*allow the Grievant to use sick leave as defined in Article XV.*" (*Joint Exhibit 2*)

On June 17, 2015 the City denied the Union's Step 1 grievance in a letter addressed to the Grievant. (*Joint Exhibit 3*)

The grievance is contrary to the plain language of the parties' Labor Agreement which only allows the use of sick leave for an immediate family member. The grievance ignores the definition of "immediate family member" set forth in Section 7.12 of the Labor Agreement. Specifically, Section 7.12 provides:

The immediate family includes the spouse, children, step-children, foster children, parents, step parents, siblings, grandparents, step-grandparents, grandchildren,

² There are also five other bargaining units within the City.

step-grandchildren, aunts, uncles, nieces, nephews, of the employee or the employee's spouse and other bona fide permanent member of the employee's household.

A live-in girlfriend is not a bona fide permanent member of the employee's household, as she is not related to the employee by blood, marriage, or the effect of law. The City has followed the plain language of the Labor Agreement, and there is no basis for the Union to claim that the City has violated the contract language.

Additionally, the City has previously and consistently denied requests by employees to use sick leave for girlfriends or boyfriends, including for those girlfriends or boyfriends who presently reside with the employee, as they are not a member of the employee's immediate family. The Union knew or should have known, either individually or through its unit employees, that the City does not permit employees to use sick leave for individuals who do not meet the definition of "immediate family member" under Section 7.12. Indeed, the employee at issue has consistently requested, and received, vacation and compensatory time off in the past to care for his ill girlfriend. That he never submitted any requests to use "sick leave" demonstrates that he was aware that such a request would be denied, as the City has done consistently in the past. This knowledge can be imputed to the Union. The plain language of the contract states that an employee may only take sick leave for an "immediately family member." Labor Agreement, Section 15.3.D. The Union, either individually or through its unit employees, has acquiesced in the City's practice of construing the Labor Agreement's definition of immediate family member to exclude live-in girlfriends and boyfriends. Thus, the Union's grievance is untimely and/or is deemed waived.

On June 22, 2015, the Union appealed the Grievance in writing to Step 2. (*Joint Exhibit 4*) The City denied the Step 2 grievance in writing on June 30, 2015 citing the same reasons it listed in its Step 1 denial response. (*Joint Exhibit 5*) Thereafter on July 2, 2015 the Union appealed the Grievance in writing to Step 3. (*Joint Exhibit 6*) On July 10 the City in writing denied the Union's Step 3 grievance citing its previous Step 1 and Step 2 denial reasons. (*Joint Exhibit 7*)

The Union filed for Mediation on July 15, 2015 through the Minnesota Bureau of Mediation Services (BMS), which is Step 4 of the parties' grievance procedure. The parties met with a State Mediator on August 31, 2015. After failing to resolve the grievance, the Union indicated that same day in writing of its intention to move the grievance to arbitration, which is Step 5 of the grievance procedure. (*Joint Exhibit 8*) The undersigned Arbitrator was notified in writing on October 10, 2015 by Union Staff Representative John Spiegelhoff of my

selection as the neutral arbitrator in this matter. Thereafter, a hearing date of January 6, 2016 was established.

RELEVANT CURRENT CONTRACT PROVISIONS

ARTICLE VII. DEFINITIONS

7.12 IMMEDIATE FAMILY: *The immediate family includes the spouse, children, step-children, foster children, parents, step parents, siblings, grandparents, step-grandparents, grandchildren, step-grandchildren, aunts, uncles, nieces, nephews, of the employee or the employee's spouse and other bona fide permanent member of the employee's household.*

ARTICLE VIII GRIEVANCE PROCEDURE

8.1 *Definition of a grievance. A grievance is defined as a dispute or disagreement as to the interpretation of specific terms and conditions of this Agreement.*

8.5 *Arbitrator's Authority:*

A. The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the terms and conditions of this Agreement. The arbitrator shall consider and decide only the specific issue(s) submitted in writing by the EMPLOYER and the UNION, and shall have no authority to make a decision on any other issue not so submitted.

B. The arbitrator shall be without power to make decisions contrary to or inconsistent with, or modifying or varying in any way the application of laws, rules, or regulations having the force and effect of law. The arbitrator's decision shall be submitted in writing within thirty (30) calendar days following close of the hearing or the submission of briefs by the parties, whichever be later, unless the parties agree to an extension. The decision shall be binding on both the EMPLOYER and the UNION and shall be based solely on the arbitrator's interpretation or application of the express terms of this Agreement and to the facts of the grievance presented.

ARTICLE XV SICK LEAVE

15.3. *Sick leave with pay may be used for the following reasons:*

A. Personal illness or physical incapacity which renders the employee unable to perform assigned job duties and responsibilities.

B. Required medical care.

C. Exposure to contagious disease under circumstances in which the health of the employees with whom the employee is associated or members of the public with whom the employee deals would be endangered by the employee's attendance on duty.

D. Illness or injury to a member of the employee's immediate family which requires the employee's personal care and attendance provided adequate reasons are given to the supervisor or Department Head for reasonable periods of time as the employee's attendance may be necessary, on the same terms upon which the employee is able to use sick leave benefits for the employee's own illness and injury.

E. Safety Leave as defined in MN Statute 181.9413 for the assistance to the employee or to the employee's immediate family.

ARTICLE XVI. EMERGENCY LEAVE

16.1. *An employee shall be granted an emergency leave with pay in the event of a death, serious injury, or a serious or contagious illness within the immediate family. Emergency leave will be deducted from the employee's sick leave balance.*

16.2. *Limitations: Emergency leaves shall not exceed the time needed to travel to and from, and attend a funeral including reasonable family services and events; or the time during which an immediate family member is seriously injured or ill (e.g. significant surgery, hospitalization, emergency medical service, etc.).*

OTHER RELEVANT PROVISIONS

CITY PERSONNEL POLICY MANUAL

September 9, 1996 Amended April 24, 2006 (Employer Exhibit 4)

Personnel Covered/Applicability Employees

All policies contained herein shall apply to all City of Red Wing employees unless they are in conflict with the specific terms of a contract, bargaining agreement or other legal agreement. In this event, the provisions therein take precedence over the conflicting terms of this policy. Where union contracts do not provide for, or are ambiguous toward a policy provided herein, these Personnel Rules shall govern.

Immediate Family Member - *Spouse, children, foster children, siblings, parents, grandparents, aunts, uncles, nephews, nieces, grandchildren or step-family members of the employee or employee's spouse; and other bona-fide permanent member of the employee's household.*

Section #330 - Sick Leave

Sick leave earned may be used by beginning and regular employees not on other leaves under the following circumstances:

D. Illness or injury to a member of the employee's immediate family which requires the employee's personal care and attendance, provided adequate reasons are given to the employee's supervisor. The employee must seek prior approval from the City Council Administrator or their designee for this provision to apply to any other permanent member of the employee's household.

ADMINISTRATIVE ORDER-NOVEMBER 1, 2008 (Employer Exhibit5)

1.0 Purpose

To clarify the definition of Immediate Family Member.

2.0 Policy

The definition of Immediate Family Member, as written in the Personnel Policy Manual, shall be revised as follows:

Immediate Family Member

Spouse (your legal spouse who is a husband or wife of the opposite sex in accordance with the federal Defense of Marriage Act), children, foster children, siblings, parents,

grandparents, aunts, uncles, nephews, nieces, grandchildren or step-family members of the employee or employee's spouse; and other bona-fide (court-appointed) permanent member of the employee's household. Same sex or domestic partners are not considered eligible.

CITY PERSONNEL POLICY MANUAL (Employer Exhibit 6)
September 9, 1996 Amended April 24, 2014

Personnel Covered/Applicability Employees

Did not change from the Amended 2006 Policy Manual.

Immediate Family Member - *Legal Spouse (as that term is defined by the laws of the employee's state of residence), children, foster children, siblings, parents, grandparents aunts, uncles, nephews, nieces, grandchildren or step-family members of the employee or employee's spouse; and other bona-fide or court-appointed permanent member of the employee's household.*

Section #330 - Sick Leave

Did not change from the Amended 2006 Policy Manual.

ADMINISTRATIVE ORDER-APRIL 9, 2015 (Employer Exhibit7)

1.0 Purpose

To clarify the definition of Immediate Family Member.

2.0 Policy

The definition of Immediate Family Member, as written in the Personnel Policy Manual, shall be revised as follows:

Immediate Family Member - *Legal spouse (as the term is defined by the laws of the employee's state of residence), children, foster children, siblings, parents, grandparents, aunts, uncles, nephews, nieces, grandchildren or step-family members of the employee or employee's spouse; and other bona-fide (court-appointed) permanent member of the employee's household. Domestic partners are not considered eligible.*

FACTS

The Grievant has been a Utility Locator in the Utilities bargaining unit represented by the Union since February 13, 2012. The Grievant's wife died on March 28, 2002 as a result of a tragic automobile accident the day before. Their infant son Jeric was severely injured in the accident and incurred a traumatic head injury. Since February 2003 the Grievant had been in a relationship with Ms. Wilson until she passed away on December 6, 2015 after a four year battle with cancer. During their relationship a daughter Taylor was born in 2005. Although they never married, the couple lived together from July 2003 until Ms. Wilson's passing. The

couple initially lived together in Baldwin, Wisconsin and moved to the Spring Valley, Wisconsin area in 2006 after purchasing a home there. Ms. Wilson was the initial mortgagee. (*Union Exhibit 1*) The couple filed papers in October 2015 to jointly become mortgage holders; however, Ms. Wilson passed away before the transaction could be finalized. (*Id*)

The Grievant testified that the couple shared finances and had a joint checking and savings account since October 31, 2003. (*Union Exhibit 2*) This account also included a joint debit card. The Grievant further testified that the couple had a joint gas and electric account (*Union Exhibit 4*) and shared joint household decisions and expenses. Although Ms. Wilson never officially adopted Jeric, they jointly shared in the rearing of Jeric and Taylor including making joint educational decisions and attending educational meetings and conferences for both children. They jointly signed the Individualized Education Plan (IEP) that Jeric was enrolled in as a result of his traumatic head injury and attended meetings with school officials regarding plan changes and ongoing program activities. The couple also shared medical decisions for both Jeric and Taylor, and Ms. Wilson would sign required medical forms for the two children.

The Grievant also testified that the couple initially made joint medical decisions involving Ms. Wilson's care. During the later stages of her illness, the Grievant made all medical care decisions for her.³ This included moving her from a local hospital to a hospital in the Twin Cities area and the decision to have her live out her remaining days at the hospital. The Grievant also made the decision to donate Ms. Wilson's corneas after her passing.⁴ (*Union Exhibit 4*) The Grievant further testified that he was the sole beneficiary on one of Ms. Wilson's life insurance policies and a joint beneficiary along with Jeric and Taylor on another.

Ms. Wilson was first diagnosed with cancer in January 2012. The Grievant first applied for leave to care for Ms. Wilson on May 15, 2012 for the period June 1 - June 4, 2012. In this Leave Application form he wanted to use 16 hours of compensatory time for "*surgery and care of fiancé*". (*Employer Exhibit 1*) His shift supervisor approved this leave request that same day. The Grievant subsequently filed 17 additional Leave Application forms requesting either vacation, compensatory or floating holiday leave for various periods from May 15, 2012

³ Ms. Wilson did not sign any document authorizing the Grievant to make medical decisions on her behalf.

⁴ The authorization form lists the Grievant's name under the next of kin heading. Under the relationship heading the Grievant is designated as "partner". There is, however, no documentation authorizing the Grievant as the decision-maker.

through May 9, 2015. (*Id*) (It appears that all leave requests were granted since there was no evidence to the contrary.)⁵

As stated earlier herein, the Grievant first applied for paid sick leave rather than other leave for Ms. Wilson's care on June 1, 2015. After this and the amended June 4, 2015 requests for sick leave were denied, the Grievant filed a new Leave Application form on June 5, 2015 requesting the use of 8 hours of vacation time for Ms. Wilson's appointment, which his supervisor signed off on; but again, did not check either the "approved" or "denied" box on the form.

The Grievant testified during cross-examination that the reason that he did not request sick leave earlier was because Utility/Street Superintendent Jerry Plein and Utility Operator/Forman Steve Thoms both informed him early on in 2012 that paid sick leave did not cover Ms. Wilson's illness and had never been allowed. (Mr. Thoms signed the 2011-2012, the 2013-2014 and the 2015-2016 contracts as the Union's Vice-President. It should be noted that Mr. Plein had been the Union President from at least 1999 when he signed the 1999-2001 contract as President for the Independent union until at least February 2007 when he signed the 2008-2010 contract as President. He was no longer the President when a Memorandum to the aforementioned contract was signed on September 28, 2009.)

The Grievant testified that he did not question Mr. Plein's or Mr. Thoms' interpretations of the paid sick leave policy because he was a new employee and did not want to "*rock the boat*". According to the Grievant, he never sought out any other Union representative concerning his eligibility for paid sick leave or attempted to file a grievance. He stated that at the time he was unfamiliar with the Agreement and how the Union worked.

The Grievant further testified that he became more knowledgeable of the Agreement and Union process during the last series of negotiations. As a result, he concluded that he should be eligible for paid sick leave to take care of Ms. Wilson after reading the language covering the term "*bona-fide permanent member of the employee's household*" in the Agreement. Shortly before he filed his June 1, 2015 paid sick leave request, he approached Mr. Thoms and told him that he did not know what was done in the past; but based upon the "*Immediate Family*" provision in the Agreement, the care for Ms. Wilson should be covered for paid sick

⁵ Although some of the Leave Application forms were all signed by his supervisor, some did not reflect an actual approval or denial on the form.

leave purposes. According to the Grievant, Mr. Thoms said that to his knowledge this had never been done before; but if he wanted to proceed with pursuing it he had that right to do so. He then filed the paid sick leave request and subsequent grievance.

The current Agreement contains a provision describing who is considered “*immediate family*”. Article VII (Definitions) Section 7.12 (“*Immediate Family*”) (*Joint Exhibit 10*)

The immediate family includes the spouse, children, step-children, foster children, parents, step parents, siblings, grandparents, step-grandparents, grandchildren, step-grandchildren, aunts, uncles, nieces, nephews, of the employee or the employee's spouse and other bona fide permanent member of the employee's household.

The first time this definition of “*immediate family*” appeared in a Utility unit contract provision while the Union represented those employees was in the initial contract with the City (2002), and remained unchanged in all subsequent contracts. The identical language was also in Section 7.12 in the 1999-2001 contract when the Independent union represented the Utility unit (*Employer Exhibit 3*), and in Section 7.10 in the Union’s 1999-2001 Public Works contract.⁶ (*Employer Exhibit 9*)

The current Agreement contains a provision describing who is eligible for emergency leave. [Article XVI (Emergency Leave)] (*Id*)

16.1. *An employee shall be granted an emergency leave with pay in the event of a death, serious injury, or a serious or contagious illness within the immediate family. Emergency leave will be deducted from the employee's sick leave balance.*

16.2. Limitations: *Emergency leaves shall not exceed the time needed to travel to and from, and attend a funeral including reasonable family services and events; or the time during which an immediate family member is seriously injured or ill (e.g. significant surgery, hospitalization, emergency medical service, etc.).*

Identical language appeared in the Independent union’s Utility unit contract (1999-2001), remained unchanged in Union’s initial Utility unit contract (2002) and continued unchanged in all subsequent Utility unit contracts.

Similar “*immediate family*” language was also contained in the 1996-1998 Operating Engineers Local 70 Utility unit contract in Article XVI (Funeral Leave).⁷ (*Employer Exhibit 2*)

16.1. *An employee shall be granted an emergency leave with pay in the event of a death, serious injury, or a serious or contagious illness within the immediate family (wife,*

⁶ The phrase “*and other bona fide permanent member of the employee's household*” was also used in the eligibility section (Article 16.1 Funeral Leave) in Operating Engineers Local 70 Utility unit’s 1996-1998 contract that will be discussed further herein. (*Employer Exhibit 2*)

⁷ Funeral Leave was changed to Emergency Leave in all subsequent contracts discussed herein.

husband, son, daughter, father, mother, brother, sister, grandchild or grandparent, aunt or uncle of the employee or the employee's spouse; or other bonafide (sic) permanent member of the employee's household).

16.2. Limitations: *Emergency leaves shall not exceed the time needed to travel to and from, and attend a funeral including reasonable family services and events; or the time during which an immediate family member is seriously injured or ill (e.g. significant surgery, hospitalization, emergency medical service, etc.).*

This is the first time a definition of “*immediate family*” was defined in any contractual document that was entered into evidence by the City. This definition of “*immediate family*” became the blue print for Section 7.12 language in all subsequent Utility unit contracts beginning in the 1999-2001 Independent Utility unit contract. (The first phrase in Section 16.1 was revised⁸; however, the phrase “*and other bona fide permanent member of the employee's household*” remained intact.)

Sick leave provisions were initially covered under the Funeral Leave or Emergency Leave provisions in Section 16.1 of all Utility unit contracts. The parties negotiated a new sick leave provision in Article XV (Sick Leave) Section 15.3(D) in the current 2015-2016 Agreement that greatly expanded the sick leave coverage from the “*serious or contagious illness*” contained in Section 16.1 to “*Illness or injury to a member of the employee's immediate family which requires the employee's personal care and attendance*”.⁹ (Joint Exhibit 10)

Evidence adduced at the hearing also disclosed that Article XV Sick Leave Sections 15.2 Subsections (A), (B) and (C) language also first appeared in the 1996-1998 contract covering the Utility unit when Operating Engineers Local 70 was the representative. (Employer Exhibit 2) The language in Subsections (A), (B) and (C) continued unchanged throughout all subsequent Utility unit contracts; however, Subsections (D) and (E) were added to the current Agreement and was renamed Section 15.3. (Joint Exhibit 10) Similar subsection (A), (B), (C) and (D) language is also contained in the Amended May 12, 2014 Personnel Policy Manual.

The City introduced its last two Personnel Policy Manuals into the record that reflected amendments to its 1996 Personnel Policy Manual.¹⁰ Both Manuals contain the identical language defining employees covered.

All policies contained herein shall apply to all City of Red Wing employees unless they are in conflict with the specific terms of a contract, bargaining agreement or other

⁸ Spouse was substituted for the previous terms husband and wife.

⁹ Subsection (E) defining “*Safety Leave*” was also added in the Agreement.

¹⁰ Amended April 24, 2006 (Employer Exhibit 4) and Amended May 12, 2014. (Employer Exhibit 6)

legal agreement. In this event, the provisions therein take precedence over the conflicting terms of this policy. Where union contracts do not provide for, or are ambiguous toward a policy provided herein, these Personnel Rules shall govern.

The Amended April 24, 2006 Policy Manual defines “*immediate family*”. (Employer Exhibit 4) (As stated earlier, this is identical language in Section 7.12 of all the Utility unit contracts discussed herein.)

Spouse, children, foster children, siblings, parents, grandparents, aunts, uncles, nephews, nieces, grandchildren or step-family members of the employee or employee's spouse; and other bona-fide permanent member of the employee's household.

The definition of “*immediate family*” was revised in an Administrative Order dated November 1, 2008.¹¹ (Employer Exhibit 5)

Spouse (your legal spouse who is a husband or wife of the opposite sex in accordance with the federal Defense of Marriage Act), children, foster children, siblings, parents, grandparents, aunts, uncles, nephews, nieces, grandchildren or step-family members of the employee or employee's spouse; and other bona-fide (court-appointed) permanent member of the employee's household. Same sex or domestic partners are not considered eligible.

An Amended May 12, 2014 Policy Manual further revised the definition of “*immediate family*”. (Employer Exhibit 6)

Legal Spouse (as that term is defined by the laws of the employee's state of residence), children, foster children, siblings, parents, grandparents aunts, uncles, nephews, nieces, grandchildren or step-family members of the employee or employee's spouse; and other bona-fide or court-appointed permanent member of the employee's household.

The City’s current definition of “*immediate family*” is contained in an Administrative Order dated April 9, 2015. (Employer Exhibit 7)

Legal spouse (as the term is defined by the laws of the employee's state of residence), children, foster children, siblings, parents, grandparents, aunts, uncles, nephews, nieces, grandchildren or step-family members of the employee or employee's spouse; and other bona-fide (court-appointed) permanent member of the employee's household. Domestic partners are not considered eligible.

The evidence adduced at the hearing disclosed that the Personnel Manuals and Administrative Orders are discussed in new employee orientation. It is also posted on official City bulletin boards and on the City’s internet web site.

Ms. Hawkins was initially hired as a Generalist in the Employee Services Department in February 2006 and became the interim Employee Services Director in March 2015. She reports to Information Services Director Laura Blair Johnson and is currently responsible for all employee human service operations including contract administration and personnel policy matters. As a Generalist, she was also involved in all aspects of human services including personnel policy matters and contract administration.

Ms. Hawkins testified that she hired the Grievant in 2012. She stated that when she hired the Grievant they had a discussion about him using paid sick leave to care for Ms. Wilson. She informed the Grievant that he could not use paid sick leave as Ms. Wilson was not a member of his “*immediate family*”; however, he could use vacation time, compensatory time or a floating holiday. She also testified that personnel policies and union contracts are discussed during new employee orientation.

Ms. Hawkins further testified that during her entire tenure the City has always interpreted the term “*bona fide*” under the second phrase of Section 7.12 to mean “*court-appointed*”. During cross-examination Ms. Hawkins testified that she was not present the first time the term “*bona fide*” appeared in a Utility unit contract under Section 7.12 and had no knowledge if the parties defined that term during any negotiations.

According to Ms. Hawkins, the Grievant requested non-sick leave for every leave request involving Ms. Wilson’s care prior to June 2015. She added that neither the Grievant nor any other employee ever filed a grievance involving the denial of paid sick leave to care for a significant other or girlfriend until the grievance herein was filed.

During her testimony, Ms. Hawkins contended that the City has always denied employees covered by union contracts the use of paid sick leave for significant others citing an incident wherein an employee in the Fire Department was deemed ineligible to use paid sick leave to care for his fiancé.¹² The City introduced an email exhibit of the circumstance surrounding this incident. (*Employer Exhibit 8*) The relevant portions of this email were sent from Fire Chief Thomas Schneider dated September 11, 2008 to then Employees Services Director Roger Seymour, who replied back the same day.

Original Message:

¹¹ According to interim Employee Services Director Stacie Hawkins, the Orders reflect changes made to current Personal Policy Manuals.

¹² This matter was resolved when the employee changed shifts with another employee.

Roger

Ben Roser's fiancé is having a medical procedure performed today. Ben inquired about using emergency/sick leave to be present during the procedure and drive her home afterward. Scott Danielson asked Stacie about this yesterday and was told a fiancé is not considered "immediate family" according to the policy manual. The policy does mention "bona-fied (sic) permanent member of the household".

You will likely be contacted today to get a definition of bona-fied (sic). I am told Ben's fiancé lives with him. I don't know about her mailing address or the address listed on her driver's license.

Ben was scheduled to work today (shift exchange) and has found people willing to replace him for the day. The inquiry is for future planning in case additional procedures, etc. are needed in the future.

Seymour's Response:

Bona fide is court appointed foster child and or adopted child. Refers to a legal connection. It does not mean live in girlfriend or even a person living with them and they have children together in Hallock.

Ms. Hawkins testified that the City's Finance Director Marshall Hallock has never been permitted to use paid sick leave to care for his live-in girlfriend, with whom he has children. She also testified that a couple of employees in Public Works including Mr. Moskwa and some employees in the Police Department have made similar inquiries into using paid sick leave for live-in girlfriends, boyfriends, or fiancés, which the City has always denied. Except for Mr. Hallock and Mr. Moskwa, she could not remember any other names. There were also no dates identified or corroborative testimony or documentation submitted to support Ms. Hawkins' testimony.

Beginning in 2006, Ms. Hawkins was responsible for taking notes during all contract negotiation sessions.¹³ She testified that the City never proposed changing the "immediate family" language in any contract to conform to the City's personnel policies while she was taking notes. She added that there were also no discussions to her knowledge in negotiations wherein any party proposed clarification of the term "bona fide" to mean "court-appointed" or someone that has legal status.

Kay Kuhlmann has been the City Council Administrator for the past 18 years. She reports directly to the City Council and is responsible to implement all City Council projects and policies. Ms. Kuhlmann, who was present during the testimony of Ms. Hawkins, testified that she was not aware of any other situations where employees sought to use paid sick leave to

¹³ This included contract negotiations for the Utility unit.

care for a girlfriend, boyfriend or significant other. She also stated that she is aware of all grievances filed with the City and is not aware of any other grievance ever being filed regarding the issue raised by the instant grievance. She could also not recall if she had any specific discussions with union employees about the use of paid sick leave for a live-in girlfriend or boyfriend.

According to Ms. Kuhlmann, she served on the bargaining committee in all union contract negotiations at relevant times herein until the 2015-2016 contract negotiations. During one of the sessions, she stated that there was a discussion with Union President Plein in the late 1990's or early 2000's regarding whether a live-in girlfriend of a certain employee would be eligible to receive coverage under the City's health insurance provisions. Mr. Plein agreed that it would be extremely difficult since this employee had a series of live-in girlfriends. As a result the parties limited health insurance coverage to spouse and children. She acknowledged during cross-examination that there had never been a similar discussion at the "table" regarding live-in or significant other eligibility for paid sick leave.

Ms. Kuhlmann further testified that they have never allowed benefits or paid sick leave for live-in girlfriends or boyfriends because it would be "unmanageable" since they do not get into an employee's personal life to determine whether a live-in would be there a year or ten years. It was her opinion that the term "*bona fide*" meant that there had to be "*some kind of official paper like a marriage certificate, a guardianship certificate, or medical directive or some legal or official grounds for it*".

Ms. Kuhlmann also testified that to her knowledge the subject of changing or modifying the terms "*bona fide*" or "*permanent*" or "*household member*" was never brought up by either the City or the Union during any contract negotiations. There was a discussion either at or outside the negotiation table with the Union about adding step-children eligibility in the "*Immediate Family*" provision.

Current Public Works Director Rick Moskowa, who is currently supervised by Ms. Kuhlmann and has been in that position for the last five and one-half years, testified that he has been employed by the City for over 32 years. He has been in upper management positions for the past 11 to 12 years. Prior to this he was an active Union member in the Public Works unit for 20+ years.¹⁴ Mr. Moskowa testified that during the time he was in the Union, he

¹⁴ The Public Works unit was organized by the Union well before the Utilities unit was organized by any union.

served as Secretary for one year prior to his tenure as President which lasted four or five years immediately prior to him becoming management. He believed this time period was from 2000-2004; however, during cross-examination he testified that he was not present during the negotiations for the 1999-2001 Independent union or the 2002 Union Utility unit contracts or the 1999-2001 Union's Public Works contract. The record evidence confirms that an individual other than Mr. Moskowa is listed as the President on the signature page of the 1999-2001 Utility unit contract or any other subsequent contract. Also, an individual other than Mr. Moskowa is also listed as the President on the signature page of the 1999-2001 Public Works' unit contract.

Mr. Moskowa also testified that he was on the Union's negotiating team for five or six two-year contracts. He speculated that the first time that he was on the negotiating team was during the 1985 contract negotiations. During one of the contract negotiations (he could not recall the date) there was a discussion regarding the definition of "*immediate family*". It was agreed that the definition would include step-children and step-parents. (A review of the contracts entered into evidence discloses that this transition took place when the Independent union negotiated its only contract (1999-2001).)¹⁵ From this he concluded that his significant other with whom he lived with from 1993 until 2003 was not included in the definition because her eligibility was not listed in the "*Immediate Family*" provision agreed to.

Jim Dahling, who has been a Greater Minnesota AFSCME Counsel 65 Business Representative for the past 16 years, is the current Counsel 65 Business Representative for the Union and has been since either 2004 or 2005.¹⁶ Prior to this he was employed by the City and signed the 1999-2001 Public Works' contract as the Union President. As Business Representative, he chaired the Union's negotiation team for all three Union units beginning with the 2005-2007 contracts. He testified that neither the Union nor the City ever attempted to clarify the definition of "*immediate family*" contained in any Union contract while he was the Union President or Business Representative. He further testified that the only discussion that involved "*immediate family*" was when they incorporated the sick leave provisions in Section 16 to Subsections (D) and (E) to Section 15.3 in the current Agreement.

¹⁵ It is possible that an earlier transition occurred in Public Works Contracts at or prior to 1999-2001 contract.

¹⁶ Business Representative Dean Tharp was the Greater Minnesota AFSCME Counsel 65 Business Representative during the negotiations for the 2002 and 2003-2004 Utility unit contracts.

UNION POSITION

The Union's position is that the Grievant was entitled to use paid sick leave to care for his fiancé since her relationship to the Grievant is encompassed within the meaning of Section 7.12 of the Agreement.¹⁷ In support of this position, the Union argues that:

- The “*clear and unambiguous*” language in Section 7.12 must be enforced as it demonstrates the intent of the parties.
- A careful examination of the language contained in the Labor Agreement coupled with the record evidence leaves no doubt that the parties intended that paid sick leave could be used for individuals other than through a blood or legal relationship to the employee or the employee's spouse as evidenced by the contractual language of “*bona fide permanent member of the employee's household*”.
- The record evidence also supports the Union's position that the parties purposely placed parameters on whether a non-relative would qualify with the terms “*bona fide*”, “*permanent*” and “*household*”. These words were carefully chosen by the parties so that employees would be barred from using paid sick leave related to short term relationships with individuals in the employee's household.
- The conjunction “*and*” cannot be ignored in interpreting the language in Section 7.12. The use of this conjunction in the definition of “*immediate family*” demonstrates that there are two distinct and different classifications or groups in this definition — those with a blood or legal relationship to the employee and those who meet the definition of “*other bona-fide permanent member of the employee's household*”.
- At hearing the City adduced evidence and testimony related to City policy and how the City unilaterally defined the term “*immediate family*”. The City presented testimony related to how they have denied non-Union represented employees the use of paid sick leave for care of a significant other. This is simply irrelevant to the instant dispute.
- The record evidence demonstrates that Ms. Wilson was a “*bona-fide permanent member of the employee's household*” and had a serious illness. In addition, the couple was also engaged. This promissory commitment to marriage further supports

¹⁷ Throughout its brief the Union erroneously referred to Section 7.11 as being the provision that contained the definition of “*immediate family*”.

the terms “*bona fide*” and “*permanent*”. As such, the Grievant is entitled to use paid sick leave pursuant to Sections 15.3 and 16.1 to care for her.

The Union also argues that the parties’ past practice and bargaining history is further evidence to support its position.

- The parties signed a “*Joint Stipulation of Facts*” on January 5, 2016 related to the instant dispute. In that “*Stipulation*” the parties agreed that the identical language of Sections 7.12 and 16.1 had been in all contracts beginning with the 2002 initial contract through the current Agreement.
- The City's reliance on their application of paid sick leave in City policy or other City collective bargaining agreements for interpretation is irrelevant in the instant dispute.
- The City’s attempt to introduce evidence of how the City applied the provisions of Sections 7.12 and 16.1 with other separate and distinct City bargaining units to employees in the Utilities unit is barred by Section 8.1 of the Agreement, which states, “*The arbitrator shall consider and decide only the specific issue(s) submitted in writing by the EMPLOYER and the UNION, and shall have no authority to make a decision on any other issue not so submitted.*”
- The City produced no bargaining history witnesses or bargaining notes or any other bargaining history evidence to support its interpretation of Section 7.12.
- The City never tried to incorporate its interpretation of “*immediate family*” to include the word “*court-appointed*” that is contained in its policy manuals in the bargaining for any contract negotiated between the parties.
- In the instant dispute, the City asserts that the Grievant has waived his rights under the Agreement through acquiescence. The City's assertion is groundless. The Grievant was told by his immediate supervisor and management employees that he was not eligible to use paid sick leave to care for his fiancé. At that time he was a new employee and unfamiliar with the contract. It was only later that he believed the “*immediate family*” language applied to her and filed a grievance.
- It is a well-accepted concept in labor relations that the enforcement of the terms and conditions of the collective bargaining agreement is a function relegated to the higher echelons of a union as they have a greater knowledge of what is contained in a

contract including how it has been interpreted (or in this case-never interpreted) and bargaining history between the parties.

- There is no evidence that the Union ever filed a grievance on this matter in the past challenging the City's interpretation as the Union was not aware of what the City's position was. Moreover, there is no precedent-setting history such as the Union filing a grievance and later withdrawing it or discussing it during collective bargaining.
- There is also no evidence that the parties ever reached a meeting of the minds on the City's interpretation and application of "*immediate family*". Notwithstanding an absence of precedent-setting history, even a failure to file a grievance or to protest past violations of clear contract language does not bar enforcement of or compliance with clear contract requirements in future cases since there has never been agreement on how a provision in the contract is to be interpreted.
- The record evidence clearly demonstrates that the City has not met their burden of clear and unmistakable evidence that a waiver occurred in the instant dispute. The City's waiver defense has no weight and should be rejected by the Arbitrator.
- The City has not been prejudiced in any form or fashion in this matter.

CITY POSITION

The City's position is that the parties' long standing interpretation of the term "*immediate family*" is consistent with the plain language of the Agreement and past practice. Thus, the Union has not met its burden of demonstrating that the City violated the Agreement, and the City's denial of the Grievant's requests to use paid sick leave for his live-in girlfriend must be upheld. In support of its position the City argues that it rightfully denied the Grievant's requests to use paid sick leave for his live-in girlfriend because the plain language of the Agreement does not permit employees to use paid sick leave for live-ins, significant others or fiancés.

- The City has consistently interpreted the term "*bona fide*" in Section 7.12 to be restricted to a "*court-appointed*" relationship or someone with legal status.
- The second phrase in Section 7.12 is conjunctive due to the use of the word "*and*" making it restrictive to the phrase preceding it; and must be interpreted in such a way as to create a similarity with the preceding phrase. Because all preceding words list some type of relative either by blood, marriage or legal effect, the second phrase is

merely a catch-all provision in the event that the list incidentally failed to include an individual who has a permanent relationship with the employee, either by blood, marriage, or the effect of law and is a member of the employee's household.

- The use of the word “*permanent*” in the second phrase describing additional “*bona fide*” members included in the “*immediate family*” is dispositive here. Contrary to a spouse, who has entered into a civil contract and cannot abrogate that contract without going through a court of law, a live-in girlfriend, boyfriend or fiancé is susceptible to fluctuation and change.
- The couple resided in Wisconsin and under Wis. Stat. §765.01 a license to marry once effectuated creates a permanent relationship severed only through the court system. There is no legal permanence to a live-in girlfriend nor is there “*common law divorce*”; rather, spouses are required to go through the legal channels and meet certain legal standards if they wish to divorce. Upon death estate law recognizes that married couples are a permanent legal unit and prioritize the living spouse when allocating a deceased spouse's estate through probate.
- Permanence cannot be established where there is no legal consequence to the significant other if the live-in girlfriend, boyfriend, or fiancé is able to move out on a whim. In such circumstances, an unmarried live-in or significant other is the legal equivalent of a roommate. To essentially permit employees to use paid sick leave for roommates would lead to harsh, absurd or nonsensical results.
- If “*immediate family*” were expanded to include the equivalent of a roommate, the City's administration of its benefits becomes unmanageable. For example, would the benefit begin the moment the individual moves in? Does the mere act of moving in establish “*permanence*” in the relationship, and if not, at what point would “*permanence*” be established? The City's interpretation that “*permanence*” requires a relationship by blood, marriage or effect of law, leads to just and reasonable results and thus must be used.
- The Grievant attempted to establish that his relationship with his live-in girlfriend was somehow “*bona fide*” by testifying that they had joint checking and savings accounts, were listed jointly on utility bills, shared household expenses and applied

for a joint home mortgage. Roommates and other non-permanent household members can also participate in these joint ventures.

- The Grievant also attempted to establish a “*bona fide*” relationship with his live-in girlfriend by testifying that she attended individualized education plan (“IEP”) meetings on behalf of the Grievant's child by another marriage. The mere fact that he brought someone along to IEP team meetings does not create a “*court-appointed*” or legal relationship between the Grievant and his live-in girlfriend. As the child's parent, the Grievant may bring whomever he chooses along to his child's IEP team meeting according to 34 C.F.R. § 300.321(a)(6) (interpreting Individuals with Disabilities Education Act as allowing parent to bring any “*other individuals who have knowledge.*”)
- The Grievant also attempted to establish a “*bona fide*” relationship with his live-in girlfriend by testifying that she made medical decisions for his first child by a previous marriage. The Grievant's live-in girlfriend had no legal authority to make decisions for the Grievant's child. Wis. Stat. § 48.92 (describing that adoption has the legal effect of allowing the adoptive parent the rights, duties, and other legal consequences of a natural parent). Since, as the Grievant testified, his live-in girlfriend did not adopt the Grievant's first child there was no legal relationship.
- The Grievant also attempted to establish a “*bona fide*” relationship with his live-in girlfriend by testifying that he made medical decisions on her behalf including donating her corneas. In order to have legally effectuated a Power-of-Attorney for health care, the Grievant and his live-in girlfriend were required to comply with Wisconsin Statutes Chapter 155. The Grievant acknowledged during his testimony that she had not signed anything authorizing him to make medical decisions for her.

If the Arbitrator finds that the phrase “*bona fide permanent member of the employee's household*” is ambiguous, the City further argues that extrinsic evidence must be examined which confirms live-in girlfriends, boyfriends, and fiancées are excluded from the definition of “*immediate family*”.

- The Minnesota Supreme Court has held that bargaining and past practice are the most reliable sources of extrinsic evidence when construing the parties' intent in drafting

contract language and in some cases it may trump “*clear and unambiguous language*” in a collective bargaining agreement.¹⁸

- The City has historically interpreted “*immediate family*” to exclude live-in girlfriends, boyfriends and fiancées. The parties' past practice of interpreting the definition of “*immediate family*” excludes live-in girlfriends, boyfriends or fiancés and is, therefore, binding.
- The City has consistently denied this type of paid sick leave request at all levels of employment, from unit employees to management.¹⁹ Additionally, Mr. Moskwa, the former Union president for the Public Works unit at the same time Union Business Representative Dahling represented both the Public Works and Utility units, testified he had a live-in girlfriend for a period of ten years while he was a member of the Public Works unit, and he knew that live-in girlfriends were not included in the definition of “*immediate family*”.
- The Union did not change the definition of “*immediate family*” or “*emergency leave*” in the Independent union contract when it took over the Utilities unit in 1999. In fact, the language has remained unchanged in every Utilities unit contract since then.
- The Grievant was informed by both management and the Union when he was first hired that he could not use paid sick leave to care for a live-in girlfriend. The Grievant subsequently only requested vacation time, compensation time or floating holiday time to care for his girlfriend until his paid sick leave request(s) in June 2015.
- Former Union President Plein and then Vice-President Thoms both informed the Grievant in 2012 that live-in girlfriends were excluded from the definition of “*immediate family*”. It is then reasonable to assume that Union Representative Dahling had the same understanding.
- The Union has acquiesced in the City's long-standing interpretation of “*immediate family*”, as it has been aware of the City's interpretation for years and has failed to file any grievances in the past or request to bargain over the language.

¹⁸ Citing, Ramsey Cnty. AFSCME Council 91, Local 8, 309 N.W.2d 785, 791 (Minn. 1981).

¹⁹ Citing the testimony of Ms. Hawkins.

- From May 2012 to June 2015, neither the Union nor the Grievant ever filed a grievance nor requested to bargain over the City's interpretation of "*immediate family*".
- The Grievant and Union's utter failure to grieve the longstanding interpretation of "*immediate family*" for years, and the Grievant's acquiescence in that interpretation by requesting to use vacation or compensatory time in lieu of paid sick leave to care for his live-in girlfriend requires that this matter be resolved through bargaining, not a grievance. The Union cannot circumvent bargaining a change to the long-standing language and interpretation of "*immediate family*" by utilizing the arbitration process.
- In addition to bargaining history and past practice, the City has consistently and uniformly interpreted similar "*immediate family*" language in its Personnel Policy Manual to exclude live-in girlfriends, boyfriends, and fiancés from the definition of "*immediate family*".
- The City's Personnel Policy Manual and amendments are given to all new employees during orientation, posted in areas where employees work and are available on the City's internet web site. Eligibility in the "*immediate family*" provision in the Policy Manual is restricted to "*court-appointed*" individuals. While employer issued handbooks and personnel policies are not binding on unions, they may aid an arbitrator in interpreting inconclusive contract language.²⁰

OPINION

The parties were unable to agree on the precise wording of the issue. In essence both parties are saying the same thing. I will, therefore, define the issue as, "Whether the City violated Section 15.3 and/or Section 16.1 of the parties' collective bargaining agreement when it denied the Grievant paid sick leave on June 5, 2015 for a medical appointment for Sarah Wilson, and whether her relationship to the Grievant is encompassed within the definition of "*immediate family*" in Section 7.12 of the Agreement; and, if so, what is an appropriate remedy?"

My authority as an arbitrator is limited by specific language in Section 8.5 of the Agreement. An arbitrator cannot ignore clear-cut contractual language, and may not legislate

²⁰ *Furniture Workers Local 395 v. Virco Mfg. Corp.*, 257 F. Supp. 138 (E.D. Ark. 1966).

new language, since to do so would usurp the role of the labor organization and employer.²¹ It is common for arbitrators to consider extrinsic evidence only where the contract provision in dispute is “*unclear and ambiguous*”. (*Id* 440) An arbitrator is not precluded from going outside the literal language of the contract and considering other factors such as other employer policies, past practice or bargaining history to resolve contract interpretation issues. There are, however, limitations to the role that it plays in contract interpretation. The Courts have sanctioned the arbitrator’s reliance on extrinsic evidence to interpret “*ambiguous*” contract provisions.²² However, if the language in issue is “*clear and unambiguous*” there is no need to consider extrinsic evidence to resolve the issue.²³

The Union bears the burden of proof in this contract interpretation dispute. The Union argues that the language in the Agreement is “*clear and unambiguous*” with respect to Ms. Wilson’s relationship to the Grievant being encompassed within the “*plain language*” definition of “*immediate family*” in Section 7.12; and, therefore, the Grievant is entitled to paid sick leave pursuant to Section 15.3(D) and 16.1 of the Agreement.

The City argues that the language of Section 7.12 should be interpreted using a “*plain language*” analysis; therefore, the Grievant’s live-in girlfriend was not within the definition of “*immediate family*” in Section 7.12 since she was not a “*bona fide permanent member of the employee’s household*”, and the grievance should be dismissed.

The City’s main argument is that the second phrase in Section 7.12 is conjunctive due to the use of the word “*and*” making it restrictive to the phrase preceding it, and must be interpreted in such a way as to create a similarity with the preceding phrase. Because all preceding words list some type of relative either by blood, marriage or legal effect, the second phrase is merely a catch-all provision in the event that the list incidentally failed to include an individual who has a permanent relationship with the employee, either by blood, marriage, or the effect of law and is a member of the employee’s household. In doing so it is adding the same restriction (“*court-appointed*”) to the second phrase of “*immediate family*” that is contained in its Personnel Policy Manual.

²¹ Elkouri & Elkouri, *How Arbitration Works*, 6th Ed. p.434 (2003).

²² *Fairview Southdale Hospital v. Minnesota Nurses Association*, 943 F.2d 1809 (1991).

²³ Elkouri & Elkouri, *How Arbitration Works*, 5th Ed. pgs. 470-515 (1997). See also Elkouri & Elkouri, *How Arbitration Works*, 6th Ed. pgs. 434-435 (2003).

The Union argues that the word “and” separates language defining blood related or legal members of the Grievant’s family from individuals who are not blood related or legally placed.

I respectfully disagree with the City’s interpretation of the use of the conjunction “and”. Grammatically, the phrase “*bona fide permanent member of the employee’s household*” is a continuation of the preceding phrase with the conjunction merely signifying that which comes after it and is the final item on the list. The last phrase may be restrictive; however, the items in both phrases of the provision are dissimilar which is allowable in restrictive phrases or clauses.²⁴ Sentence structure is not the issue; rather, it is the definition of a “*bona fide permanent member of the employee’s household*” that must be interpreted in order to resolve the issue before me.

Evidence adduced at the hearing disclosed that the couple was in a long-term relationship that began in February 2003, and only ended with Ms. Wilson’s passing in December 2015. Ms. Wilson purchased a house in Spring Valley, Wisconsin in July 2003. The Grievant and his son Jeric moved in with her at that time. The couple had a daughter Taylor in 2005. It appears that at some point Ms. Wilson became the Grievant’s fiancé and the four continued to live together until Ms. Wilson’s passing in December 2015.²⁵

Beginning in late October 2003, the couple had a joint checking and savings account that included a joint credit card. They jointly shared household expenses and both had their names listed on the gas and electrical statements. They jointly shared the rearing of their two children including making joint decisions regarding the children’s education as well as their medical care. Ms. Wilson had initially been the mortgage holder of the Spring Valley house. In October 2015 the couple applied for a joint mortgage, but it was never finalized because of Ms. Wilson’s passing.

The couple also made joint decisions involving Ms. Wilson’s medical treatment after she was diagnosed with cancer in January 2012. During the later stages of Ms. Wilson’s illness, the Grievant made all the medical decisions for her and also signed forms authorizing the

²⁴ Here are a couple examples of a restrictive phrase or clause: My shopping list included bread, milk, and potatoes. My shopping list included bread, milk, potatoes, and snow tires. [Still restrictive even though the last item is dissimilar.]

²⁵ The only evidence of this is that the Grievant listed her as his fiancé on City Exhibit 1 and his making reference to this during his testimony.

donation of Ms. Wilson's corneas.²⁶ The Grievant and the couple's children were beneficiaries of Ms. Wilson's life insurance policies.

According to Elkouri & Elkouri, "*A contract term is said to be ambiguous if it is susceptible to more than one meaning, that is, if plausible contentions may be made for conflicting interpretations.*" (*Id* 434) *Where the "words are plain and clear, conveying a distinct idea, there is no occasion to resort to interpretation, and their meaning is to be derived from the nature of the language used."* This is referred to as the "*plain meaning rule*".

In this context arbitrators often use dictionary terms, which provides a neutral interpretation, to resolve word meanings in the absence of a showing of mutual understanding. (*Id* 450) According to various law dictionaries, the term "*bona fide*" is defined as "*in good faith; honest; genuine; actual; authentic; acting without the intention of defrauding*";²⁷ The Merriam-Webster dictionary defines "*bona fide*" as "*made in good faith without fraud or deceit; made with earnest intent or sincere*".²⁸

"*Permanent*" is defined in legal dictionaries as, "*Fixed, enduring, abiding, not subject to change. Generally opposed in law to "temporary"*".²⁹ The Merriam-Webster dictionary defines "*permanent*" as "*lasting or continuing for a very long time or forever: not temporary or changing.*"³⁰

"*Household*" is defined in legal dictionaries as, "*Those who dwell under the same roof and compose a family*".³¹ The Merriam-Webster dictionary defines "*household*" as "*the people in a family or other group that are living together in one house*".³²

Thus, according to the plain language interpretation of the second phrase of Section 7.12, "*other bona fide permanent member of the employee's household*", is someone who "*in good faith, honestly and without the intention of deceit or fraud*" is in a "*lasting or continuing relationship or for a long time*" and dwells "*under the same roof and compose a family or group*".

²⁶ There was never any official authorization.

²⁷ <http://legal-dictionary.thefreedictionary.com/bona+fide>

²⁸ <http://www.merriam-webster.com/dictionary/bona%20fide>

²⁹ <http://thelawdictionary.org/permanent>

³⁰ <http://www.merriam-webster.com/dictionary/permanent>

³¹ <http://thelawdictionary.org/household/>

³² <http://www.merriam-webster.com/dictionary/household>

It is without question that Ms. Wilson's relationship is encompassed within the "*clear and unambiguous*" language in Section 7.12. The evidence adduced clearly established that the Grievant and Ms. Wilson lived together under the same roof with their two children for a long period of time, which was only interrupted by the passing of Ms. Wilson. They lived together in the same household in a good faith secure relationship with a complete absence of fraud or an attempt to deceive. Since Ms. Wilson was a "*bona fide permanent member*" of the Grievant's "*household*" at the time the Grievant requested paid sick leave for June 2005 to care for her, he is entitled to receive it pursuant to Section 15.3(D) and 16.1 of the Agreement.³³

As stated earlier herein, the City's also makes an "*ambiguous*" argument and; therefore, extrinsic evidence must be considered to resolve the issue in dispute. Even assuming *arguendo* that the City is correct, the Union would still prevail in this arbitration proceeding.

The City wants to attach a caveat to Section 7.12 restricting eligibility in the second phrase of this provision to individuals who have been "*court appointed*". This is the same caveat that is contained in the City's "*immediate family*" definition in the aforementioned excerpts of the City's Personnel Policy Manuals and Administrative Orders.³⁴

The definition of employees currently covered in the Personnel Policy Manual (*Employer Exhibit 6*) has remained unchanged since at least 2006. While this definition of "*immediate family*" has changed several times in the City's policy manuals and administrative orders, it has remained unchanged in Section 7.12 since the Union began to represent Utility unit employees.

The Amended April 24, 2006 Policy Manual defined "*immediate family*". (*Employer Exhibit 4*)

Spouse, children, foster children, siblings, parents, grandparents, aunts, uncles, nephews, nieces, grandchildren or step-family members of the employee or employee's spouse; and other bona-fide permanent member of the employee's household.

³³ Although the grievance does not specifically identify that Section 16.1 was violated, the broad wording encompasses this.

³⁴ See the language under OTHER RELEVANT PROVISIONS PGS. 5-8.

This is the same definition that is contained in Section 7.12 of all Utility unit contracts going back to the 1999-2001 contract when the Independent union represented the unit.³⁵ It was also contained in the Union's 1999-2001 Public Works' contract.³⁶

The City changed the definition of "*immediate family*" in an Administrative Order dated November 1, 2008. (*Employer Exhibit 5*) Coverage of related family members was redefined in the first phrase of the provision. It was also the first time the term "*court-appointed*" appeared in any City personnel documents involving the provision in the second phrase in dispute herein. It is in parentheses between "*bona fide*" and "*permanent*". It appears from the way the sentence is structured the City was now limiting or clarifying and/or restricting the definition of "*bona fide*". It also added the ineligibility of same sex or domestic partners language.

The Amended May 12, 2014 Policy Manual (*Employer Exhibit 6*) further changed the definition of "*immediate family*". Coverage of related family members was again redefined in the first phrase of the provision, and the parentheses surrounding "*court-appointed*" was removed in the second phrase. By doing this, the City was adding a further restriction to the term "*permanent*" to define the term "*member*". The conjunction "*or*" was also inserted separating "*bona fide*" from "*court-appointed*". This action establishes two independent criteria (adjectives) modifying or describing the term "*permanent*". It also dropped the same sex or domestic partner restrictive language.

The current City definition of "*immediate family*" is contained in an Administrative Order dated April 9, 2015. (*Employer Exhibit 7*) The language in the first phrase of the provision remained unchanged from the Amended May 12, 2014 Policy Manual. The City's final language in the second phrase reverted back to its description of a "*member*" that was contained in the November 1, 2008 Administrative Order. (The parentheses after "*bona fide*" surrounding "*court-appointed*" were reinstated and the coordinating conjunction "*or*" was removed in the second phrase.)

The above cited evidence discloses that the City started out with an "*Immediate Family*" provision in the 2008 Amended Personnel Policy Manual identical to the one contained in

³⁵ The second phrase language was also contained in Section 16.1 (Funeral Leave) in Operating Engineers Local 70 1996-1998 contract

³⁶ It can be assumed that this definition continued in subsequent contracts since no evidence was presented by either party to the contrary.

Section 7.12 of all the Utility unit contracts where the Union was the representative.³⁷ Thereafter, the evidence clearly shows that while the provision remained identical in every subsequent Section 7.12 provision negotiated by the Union, the City was constantly changing its definition or eligibility composition within both phrases of the “*Immediate Family*” provision in its personnel policies.

It appears that the City was subsequently trying to restrict the eligibility of a “*permanent member of the employee's household*” to an individual who was “*court-appointed*” by first modifying “*bona fide*”, than “*permanent*” and finally settling on “*bona fide*”, which resulted in an equally if not far more ambiguous reading of the second phrase of this provision than is contained in Section 7.12. Thus, if the City is arguing that the language in the second phrase of Section 7.12 is ambiguous then it is clear that the language as defined in the “*Immediate Family*” provision in its Personnel Policy Manuals and Administrative Orders also has to be ambiguous.

The City has interpreted “*bona fide*” to be limited to someone “*court-appointed*”, yet failed to propose or insert this major restrictive change in Section 7.12 language during any contract negotiations; rather it relied on its authority contained in the definition of “*Employees*” in its personnel policies to declare contract language ambiguous. It could then usurp contract provisions and apply its unilateral policies. Arbitrators frown upon adopting any unilaterally imposed terms that were not discussed during negotiations. Rather, they have adopted a definition in accordance to the “*plain language*” principals in interpreting contracts.³⁸ Moreover, unilaterally promulgated policies that conflict with negotiated contracts inherently are non-binding. (*Id* 465)

The bottom line is I am very reluctant to replace language contained in a negotiated provision of a contract that can be defined by its “*plain language meaning*” with language formulated outside the collective bargaining process wherein a union had no input or conclusive evidence that the union formally adopted this language. I am also reluctant to interpret or add language to a contract that should be a product of the collective bargaining process rather than arbitration.

³⁷ It was the identical language in Section 7.10 of the Utility contract when the Independent union represented the unit and in Section 16.1 when Operating Engineers Local 70 represented the unit.

³⁸ Elkouri & Elkouri, *How Arbitration Works*, 6th Ed. p.456 (2003).

Granted a former and current Union official informed the Grievant that Ms. Wilson's relationship with the Grievant precluded him from seeking paid sick leave to care for her. Since Mr. Plein was a management official and former Union official and Mr. Thoms was both a supervisor and Union official at the time the conversation took place, it is not known whether they were expressing management's or the Union's position on the Grievant's paid sick leave inquiry. Further, AFSCME Council 65 Union Business Representative Jim Dahling, who represented the Union in contract negotiations and grievance processing beginning in 2004 or 2005 and the Local 737 Union President when the 1999-2001 Public Works' contract was negotiated, testified that it never was the Union position that "*bona fide*" was restricted to "*court-appointed*" individuals in Sections 7.12 or 16.1.³⁹

More importantly sick leave coverage was greatly expanded from "*serious or contagious illness*" in Section 16.1 to "*Illness or injury to a member of the employee's immediate family which requires the employee's personal care and attendance*" in Section 15.3(D). (*Id*) Thus, the Grievant's arguable eligibility under Section 16.1 became unquestionable in Section 15.3(D) because of Ms. Wilson's deteriorating illness and her eligibility under the "*Immediate Family*" provision of the Agreement.

The City argues that "*past practice*" supports its decision to deny the Grievant paid sick leave to care for his live-in girlfriend. In support of this argument the City cites evidence adduced during the hearing that it has always applied the language in the "*Immediate Family*" provision contained in its personnel policies. The City specifically cited an email where paid sick leave for an employee in the City's Fire Department to care for his fiancé would have been denied.

The City through interim Employee Services Director Hawkins testified that other employees, including at least two unidentified employees from the Public Works' Department, some unidentified members of the Police Department and City's Finance Director Hallock, had inquired about the use of paid sick leave to care for a significant other and were told it was not allowed. No one was called as witness nor was any documentation proffered to corroborate this testimony nor was it established that any of these purported employees were bargaining unit members.

³⁹ As stated earlier herein, the identical "*immediate family*" language contained in Section 7.10 of this contract became the standard language in the "*Immediate Family*" provision (Section 7.12) of all Utility unit contracts beginning with the 1999-2001 Independent union contract.

Evidence adduced at the hearing through Public Works director Moskowa indicated that during Public Works' unit contract negotiations, he determined that his live-in girlfriend was not covered under the "*Immediate Family*" provision in the contract. He did not indicate that this determination was an agreement of the parties nor did he furnish a time period for this discussion. The evidence also did not disclose whether he was the President of the Union or a management official at the time of these negotiations.

The City did not proffer testimony on any other situation where either paid sick leave to care for a significant other or live-in was requested or whether any other employee in the Utility unit used other leave to care for a significant other or live-in. In fact when queried, City officials acknowledged that there were no other situations.

Arbitrators have recognized that in the absence of a written agreement "*past practice*" in order to be binding on both parties must be unequivocal, clearly enunciated and acted upon and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. (*Id* 460) Less weight is given to the unilateral action of one of the parties. (*Id* 461) The City's limited practice hardly rises to the level of "*past practice*" to support its argument. It is clear that hearsay or unsubstantiated evidence or actions in other bargaining units or actions directed at non-union employees set forth in the aforementioned four paragraphs hardly constitute "*past practice*".

The City also cites the fact that neither the Grievant nor any other employee in a bargaining unit represented by the Union ever filed a paid sick leave grievance to care for a significant other or live-in until the Grievant's filing in June 2015. This also does not constitute "*past practice*". Additionally, being told this same information by his supervisor who was Vice-President of the Union at the time also does not constitute "*past practice*" since it cannot be determine whether he was acting as a management official or a Union representative. It is also irrelevant because of the later less restrictive paid sick leave language contained in Section 15.3(D) as discussed earlier herein.

"Waiver is defined as the voluntary relinquishment or abandonment—expressed or implied—of a legal right and requires that the party alleged to have waived a right must have had both knowledge of the existing right and the intention of foregoing it. There can be no waiver of a contract right without knowledge that the right is being abridged." (*Id* 560) [Acquiescence] *"denotes a waiver that arises by tacit consent or by failure of a person for an*

unreasonable length of time to act on rights of which the person has full knowledge. While arbitrators generally hold that acquiescence by one party to violations of an express rule by the other party precludes action about past transactions, they do not consider that acquiescence precludes application of the rule to future situations.” (Id 560-561) Further, most arbitrators require that contract provisions can only be waived by someone with authority to do so. (*Id* 565) The fact that the neither the Grievant nor the Union ever filed a grievance until June 2015 or that the Grievant may have been told by management officials or a Union representative that paid sick leave did not cover his care for Ms. Wilson does not constitute “*acquiescence*” or a “*waiver*”. Mr. Plein was a management official at the time and there is no evidence that Vice-President Thoms had this binding authority in 2012. Even if he did, which I doubt, his actions are not applicable or controlling for future situations.

Clearly “*acquiescence*” or a “*waiver*” has not been established in this matter, especially since employee sick leave coverage was expanded in the current Agreement as discussed earlier herein. Moreover the City cannot demonstrate that it has been prejudiced, damaged or injured in the Union’s previous failure to grieve the denial of paid sick leave as discussed in this matter.

My ruling in this matter is limited to the specific relationship that the Grievant had with Ms. Wilson in my finding that she was a member of his “*immediate family*” pursuant to Section 7.12. Not all “*live-in*” relationships will meet the “*immediate family*” test. Currently, this will need to be interpreted on a case by case basis, which could possibly lead to more grievances being filed. A possible solution to this predicament is for the parties to clearly set out some definitional parameters during future contract negotiations.

CONCLUSION

In view of the foregoing, I conclude that the City violated the Agreement; and I shall, therefore, sustain the grievance in its entirety. The Grievant was entitled to use paid sick leave pursuant to Section 15.3(D) of the Agreement to care for Ms. Wilson during her illness.⁴⁰ As a remedy, the Grievant was entitled to use paid sick leave from June 5, 2015

⁴⁰ In view of this finding, there is no need to address whether the Grievant was also eligible for sick leave under Section 16.1 of the Agreement.

until Ms. Wilson's passing on December 6, 2015 to the extent that he had sick leave available.⁴¹

AWARD

IT IS HEREBY ORDERED that the grievance be and is hereby sustained.

IT IS FURTHER ORDERED that the Grievant be allowed to use sick leave from June 5, 2015 until Ms. Wilson's passing on December 6, 2015 to the extent that he had sick leave available.

FURTHER, The City will restore vacation time or compensation time or floating holiday time that the Grievant used from June 5, 2015 until December 6, 2015 to the extent that he had sick leave available.

The undersigned Arbitrator will retain jurisdiction in this matter for a period of forty-five (45) days from the receipt of this Award to resolve any matters relative to implementation.

Dated: February 13, 2016

Richard R. Anderson, Arbitrator

⁴¹ The remedy is consistent with my arbitral authority. (*Id* 1188-1193) It is also consistent with well-established Court sanctioned NLRB remedial authority in the Federal Sector. See *NLRB Casehandling Manual Part 3 Section 10536.1*.